University of Michigan. He had won distinction as an undergraduate and as a graduate in history and a career was open to him in that field. He decided, however, to study law and in our Law School won the respect and affection of all who knew him well. After an unusually fruitful period of study at Oxford, where he laid the foundations for his work "THE HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY" under Sir Paul Vinogradoff, he was called in 1912 to an assistant professorship in this Law School. Here his work was interrupted for two years by illness, but in 1914 he resumed teaching and in 1915 began carrying a full program, including the courses in Equity and the History of English Law. His unusually broad foundation, a mind acting with lightning-like rapidity and a passion for accuracy and thoroughness, together with an appealing personality, brought to him marked success from the outset. Besides the courses mentioned, he at one time gave that in Criminal Law and had been teaching Future and Conditional Interests in Property for two years before he left this School.

It will be seen that Professor Barbour's experience was almost exclusively academic in character; but it is a remarkable fact, well recognized by his colleagues, that he showed a really extraordinary aptitude for and understanding of practice and procedure and of the practical considerations in litigation. This capacity, surprising in view of the fact that he had not practiced at the bar, grew probably out of his unusually keen perceptive faculties and from his arduous experience in the Records Office in London in working out the procedure in hundreds of early English cases which none but himself had examined for centuries. This unusual combination of qualities assured for him a constantly growing measure of influence and reputation.

We sorely regretted his leaving us in the fall of 1919 to accept the flattering call from Yale University, but we rejoice that another group of law teachers besides our own had had the opportunity to know him intimately. We would not have been content to leave our good friends at Yale in easy possession of him, but wherever he might have been he would have added constantly to the achievements of legal scholarship and to the prestige and serviceableness of our profession.

This is perhaps not the place for the most intimate expression of our personal affection for the man who has gone nor an estimate of his purely personal qualities, and yet we cannot refrain utterly, for Willard Barbour possessed qualities which made him unusually interesting and stimulating as a colleague and gave to the quality of his friendship a strength and an appeal and fineness which it is not given to men to meet often in life. A very wide circle of friends among colleagues and students in three law schools mourn the loss of a brilliant scholar and teacher and a friend of unswerving loyalty, and unselfish affection.

CONDEMNATION OF PROPERTY AGAINST USE FOR APARTMENT BUILDING.—The General Statutes of Minnesota, Supplement 1917, secs. 1639-10 to 1639-16 (Laws of 1915, c. 128) provide for the creation of restricted residence districts in cities of the first class on petition of 50 per cent of the owners of real estate therein. The City Council is given the power of eminent

domain to enforce its provisions. The City of Minneapolis passed an ordinance pursuant thereto forbidding, *inter alia,* the erection of apartment buildings in certain districts. In a mandamus proceeding by the relator to compel the issuance of a building permit for an apartment house it was *held,* Hallam and Holt, JJ. dissenting, condemnation cannot be had for a use which is not public and the condemnation against the use of property for an apartment house is not a public use. *State ex rel Twin City Building and Investment Co.* v. *Houghton* (Minn., 1919) 174 N. W. 885. On rehearing, the decision was reversed on the ground that the act contemplated would come within the scope of the police power. *State* v. *Houghton* (Minn., 1920) 176 N. W. 159.

The right of a municipality by ordinances and by-laws under state authority to regulate the mode of living and provide for the public health, morals, safety, welfare and comfort are classified primarily into three groups: those of Police Power, Eminent Domain and Taxation. These powers do not spring from any delegation of constitutional power but "underlie the constitution and rest upon necessity, because there can be no effective government without them." "They exist as a necessary attribute of sovereignty." *People* v. *Adirondack Ry. Co.* (1899), 160 N. Y. 225, 236-238. Prima facie, they are unlimited. That government may not become despotic the fundamental law—the constitution—has placed restrictions on their use. In determining therefore, the appropriate length to which their exercise may be carried, it is necessary to look rather to these restrictions than to the inherent scope of the powers. Through a period of judicial construction the meaning of such phrases as "private property shall not be taken for a public use without just compensation," (U. S. Constitution, Art. V, Amendments), or "shall not be destroyed for public use without just compensation therefor first paid or secured," (Art. I, Sec. 13, Constitution of Minnesota), have received something like definite and fixed meanings. Due to the intense practicality and the variety of conditions under which the questions arise no specific definition can hope to more than imply the nature of the powers. In *C. B. & Q. Ry. Co.* v. *Illinois,* 200 U. S. 561, at p. 592, the Court in discussing the first of the powers enumerated, says, "The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals or the public safety." In *Mutual Loan Co.* v. *Martell, 222* U. S. 225, these words were cited with approval. Of the second of these powers in *Trenton Water Power Co.* v. *Raff,* 36 N. J. L. 355, the Court says, "The destruction of private property either total or partial or the diminution of its value by an act of the government directly and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking within the meaning of the constitutional provision and the power can only be exercised under the right of eminent domain subject to the constitutional limitation of making just compensation." The third power, that of taxation, is very generally said to rest on the same consideration as the power of eminent domain on the question of the purposes for which it may be resorted to. In *Lowell* v. *Boston,* 111 Mass. 454, where taxpayers objected to taxation to provide for payment of bonds issued to assist by loans, owners of land burned over in the Boston fire, the Court,

in holding the taxation not for a public purpose and therefore void, says, "So far as it concerns the question of what constitutes a public use or service that will justify the exercise of these sovereign powers over rights of property this identity renders it unnecessary to distinguish between the two forms of exercise as the same test must apply to and control in each." This limitation does not apply, however, to the subject matter of taxation nor the motive but only the disposition of the proceeds.

A resumé of some of the cases in which the aid of these powers has been invoked will serve to clarify their meaning. In *Mutual Loan Co.* v. *Martell*, 225 U. S. 232, the Court passed upon an act of the Massachusetts legislature invalidating the assignment of future wages without the consent of the wage-earner's wife and employer. Against an objection that the exercise of the police power, as this was admitted to be, must have for its purpose "some clear, real and substantial connection with the preservation of the public health, safety, morals or general welfare" the Court, in sustaining the statute, said that the power "extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people." In *Barbier* v. *Connolly* (1885), 113 U. S. 27, 30-32, an ordinance of the City of San Francisco prohibited the carrying on of washing and ironing of clothes in public laundries and wash-houses within certain prescribed limits of the city and county from 10 P. M. until 6 A. M. It was claimed that this amounted to a deprivation of property under the Fourteenth Amendment. Field, J., says "the provision is purely a police regulation * * * It may be a necessary measure of protection in a city composed largely of wooden buildings * * * and of the necessity of such regulation the municipal body is the exclusive judge."[1] In *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, the legislature had passed a law allowing a reasonable attorney fee to successful plaintiffs in actions against railroad companies for damage due to negligent escape of fire. It was upheld on the ground that it was primarily for the purpose of securing the utmost care on the part of the companies in the performance of their duties.[2] In *Jacobson* v. *Massachusetts*, 197 U. S. 11, the Court upheld a statute requiring compulsory vaccination against smallpox, in the discretion of the health authorities.[3] In the *Loan Company case, supra*, the right of property was not directly involved even if one could be said to have a property right in unearned wages. It was a straight question

[1] *Ex parte Quong Wo*, 161 Cal. 220.

[2] Accord: *Seaboard Air Line* v. *Seegers*, (1907) 207 U. S. 73, 77-79. *Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U. S. 165, *contra*. See also *Henning* v. *Georgia*, 163 U. S. 299, prohibiting running of freight trains on Sunday; *Gilman* v. *Philadelphia*, 3 Wall. 713 and *Cardwell* v. *American Bridge Co.*, 113 U. S. 205, where the legislature was sustained in its attempt to foster one public use at the expense of another; *Charlotte C. & A. R. Co.* v. *Gibbs*, (1892) 142 U. S. 386, imposing on railway corporations alone the expense of the State Railway Commission; *Noble State Bank* v. *Haskell*, 219 U. S. 104, levy of assessment on banks to provide reserve fund in case of bankruptcy of any bank; *State ex rel Yaple* v. *Creamer*, 85 Ohio St. 394, providing for Workmen's Compensation by general assessment of employees.

[3] *Laurel Hill Cemetery* v. *City and County of San Francisco*, 216 U. S. 358, prohibiting burial of dead within city limits; *People ex rel Barone* v. *Fox*, 144 App. Div. 611, medical treatment of prostitutes.

of public morals and welfare. In the *Connolly* and *Quong Wo* cases, the decision clearly rested on the ground of public safety. The *Atchison case,* conceding the purpose to be as stated by the Court, finds like justification. The *Jacobson case* is based on the right to legislative with a view to the public health. These cases are essentially different from such cases as *City of Passaic* v. *Patterson Bill Posting, Advertising and Sign Painting Co.,* 72 N. J. L. 285, in that the former involve primarily, regulations of conduct while the latter are aimed more directly against private property rights. In the *Patterson case,* an ordinance provided that no sign or billboard should be more than eight feet above the surface of the ground and not less than ten feet from the street line. The Court says, "the fact that this ordinance is directed against signs and billboards only and not against fences indicates that some consideration other than the public safety led to its passage. It is probable that the enactment was due rather to aesthetic considerations than to considerations of public safety * * * Aesthetic considerations are a matter of luxury and it is necessity alone which justifies the exercise of the police power to take private property without compensation." The Supreme Court of the United States in *Thomas Cusack Co.* v. *City of Chicago,* 242 U. S. 526, apparently found a way to circumvent this objection. A statute prohibited the erection of any billboard on any lot in any street in which one-half the buildings were used exclusively for residence purposes unless permission was obtained in writing from a majority of the owners. The Court found that such billboards were hiding places for criminals and upheld the law on the ground that it came within the purview of the police power as a regulation for the public safety. It is difficult to see why the same objection would not apply in this case as served to restrain the court in the *Passaic case, supra.* No reason is apparent why billboards should be any better for this purpose than fences or other similar structures. As said in *Crawford* v. *Topeka,* 51 Kan. 756, where an ordinance provided that no person should erect any billboard or other structure for advertising purposes unless placed at least a distance exceeding five feet of the height of such signs from the sidewalk, "All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort. * * * In what way can the erection of a safe structure for advertising purposes near the front of a lot endanger public safety any more than a like structure for some other lawful purpose." Equally good shelter is afforded by a fence without a poster on it as one so decorated.

In all of these cases the real legislative intent as seen by the courts was not the apparent or express intent. An interesting case arose in Massacnusetts, *Commonwealth* v. *Boston Adv. Co.,* 188 Mass. 348, in which the legislature had passed a law prohibiting the display of signs so that they might be seen from Revere Beach Park Way in Boston. Here, avowedly, the purpose was to cater to the aesthetic. In declaring this statute invalid, the Court says, "We agree that the promotion of the pleasure of the people is a public purpose for which public money may be used and taxes laid even if the pleasure is secured merely by delighting one of the senses * * * The question here is not of the power of the state to expend money or to lay taxes, to

promote aesthetic ends or to regulate the use of property with a view to promote such ends. It is of the right of the state by such regulations to deprive the owner of property of a natural use of that property without giving compensation for the resulting loss to the owner."[4] A rather broad distinction is taken between the powers of taxation and eminent domain and the police power in that the latter cannot be used to infringe on property rights unless a clear necessity exists, while taxation and eminent domain need only be for a public use. One way of eliminating this rather artificial distinction would be to concede the right to exercise the police power with compensation in those border line cases where any real distinction is well nigh impossible. Again in *Bostick* v. *Sams* (1902), 95 Md. 402, the question came before the courts. The City of Baltimore, by an ordinance provided that no permits should be granted for buildings in certain portions of the city unless they should in the judgment of the Judge of the Appeal Tax Court, conform to the general character of the buildings previously erected in the same locality and did not impair the value of surrounding property. A permit was requested for a building to house a circus. The Court held that, aside from the use to which the building was to be put, an independent question, a general grant of municipal police power and charter provisions authorizing regulations to guard against constructions of buildings so as to be unsafe, inflamable, offensive, deleterious to health, dangerous to life, limb or

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[4] Accord: *People* v. *Green*, 83 N. Y. S. 460.

Attempts to regulate billboard and other advertising have been made by the following states:

Conn. 1915, c. 314, p. 2179. Licenses for advertisements. Held constitutional in *State* v. *Murphy*, 98 Atl. 343.

Ill. 1909, p. 139. Cities, villages and towns to license and regulate advertising, billboards, etc.

Md. 1914, c. 824, p. 1554, at 1557. (Roadside Tree Law) Prohibits advertisements and billboards along public roads.

Mass. 1903, c. 158, p. 121. Metropolitan Park Commission given power to prohibit erection of any advertising device which should be plainly visible to persons passing along the parkway. See *Commonwealth* v. *Boston Advertising Co.*, 188 Mass. 348.

Id. 1915, c. 176, p. 157. Regulating signs, awnings and other projections in public ways.

Mass. Constitution, Article of Amendment, No. 3. "Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law." Ratified Nov. 5, 1918.

N. J. 1898, p. 836, sec. 152. Misdemeanor to place advertisement on Hudson River Palisades. Held unconstitutional in *State* v. *Lamb*, 98 Atl. 459.

Ohio. Constitutional Amendment, Art. XV, sec. 11, regulating use of billboards. Defeated September 3, 1912. Ohio is said to be the first state to attempt billboard regulation by constitutional provision.

R. I. 1910, c. 542. Cities and towns to regulate out-door advertising. Held valid in *Gilmartin* v. *Standish-Barnes*, 40 R. I. 219.

Id. 1914, c. 1075, p. 133. Forbids billboards near railroad crossings and intersections of highways.

Great Britain. 1907, c. 27, p. 116. (Advertisements Regulation Act). "2. (2) Any local authority may make byelaws * * * For regulating, restricting or preventing the exhibition of advertisements in such places and in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape."

property did not authorize such provisions as the above. These so-called zoning laws have been enacted by a number of states.[5] The outstanding feature of these cases seems to be that no court has yet accorded to any state or local government the right to impair private property rights by the use of the police power for aesthetic purposes. In the field of eminent domain a greater latitude is allowed. Such cases as *United States* v. *Gettysburg El. R. Co.*, 160 U. S. 668 and *Attorney General* v. *Williams*, 174 Mass. 476, have now firmly established the right of the government to condemn land for public parks. 20 HARV. L. REV. 35. Not every public purpose, however, will warrant its use. In *Opinion of the Justices*, 211 Mass. 624, the Court held unconstitutional a law providing in effect that the state might purchase, develop, build upon, rent, manage, sell and repurchase land. Nor in the *Opinion of the Justices*, 204 Mass. 607 could the City of Boston, under a general power of eminent domain, acquire property for the purpose of replatting certain portions of the city though this would undoubtedly facilitate traffic and was the only feasible method. The difficulty here was the absence of any real public use. No direct benefit accrued to the public as in the case of *Attorney General* v. *Williams, supra,* where the actual enjoyment of the park was greatly enhanced by restricting the height of surrounding buildings. In his zeal to sustain the Minnesota law, a reviewer of the instant case in the MINNESOTA LAW REVIEW, suggests that the streets in the restricted district be put under the jurisdiction of the park board and thereby bring the case within the decision of *Attorney General* v. *Williams*. However it is doubtful if the courts would consider such a proceeding anything more than a mere subterfuge except in those cases where the streets really merited such classification as in the case of public drives and boulevards and even then the *Williams case* would hardly apply since the real objection in the instant case is not so much to the character and style of the building as to the fact that it is an apartment house. Such courts as tend toward a liberal interpretation of the law with possibly a greater regard for progressive welfare than a strict adherence to judicial precedent and functions can find justification for such decisions as this one in the field of eminent domain but it can hardly be successfully disputed that it is a distinct departure from any previously decided case and inaugurates the rather broad and general principle that a public purpose as distinguished from a public use may serve as a basis for the exercise of the right of eminent domain.[6]

A. B. T.

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[5]Zoning laws: *Calif.*, 1917, c. 734, p. 1419; *Ill.*, 1919, p. 262; *La.*, 1918, act. 27, p. 35; *Mass.*, Const., Art. of Amendment No. 13, approved Nov. 5, 1918; *Minn.*, 1915, c. 128, p. 180; *Neb.*, 1919, c. 185, p. 417; *N. J.*, 1917, c. 54, p. 94; *N. Y.*, 1917, c. 483, p. 1463; *Oreg.*, 1919, c. 300, p. 539. Reprinted by permission, from LOOSE LEAF INDEX TO LEGISLATION, October, 1919.

[6] As to the analogous subject of Excess Condemnation see the following laws: *Calif.*, Const., Art. XI, Proposed amendment by adding sec. 20. See 1913, c. 65, p. 1704. Rejected Nov. 3, 1914: 1915, c. 45, p. 1864. Rejected Oct. 26, 1915: 1917, c. 49, p. 1938. Rejected Nov. 5, 1918. *Conn.*, 1907, Special laws, p. 44, sec. 7. (Hartford). *Haw.*, 1919, act 170, p. 230. *Ind.*, 1919, c. 144, p. 639. See secs. 8 and 10. *Mass.*, 1904, c. 443, p. 434. Const., Art. X, Pt. I, amended by Art. XXXIX. See 1910, p. 875: 1911, c. 91, p.